United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

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P/S.

75-1261

To be argued by
JEREMY G. EPSTEIN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1261

UNITED STATES OF AMERICA,
Appellee,

—v.—

RAUL ESTREMERA,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

Raul Estremera appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York on June 24, 1975 after a five day trial before the Honorable Kevin T. Duffy, United States District Judge, and a jury.

Indictment 73 Cr. 319, filed April 12, 1973, charged Estremera, Oscar Lee Washington, Pedro Mario Monges, and Victor Cumberbatch in Count One with bank robbery, in Count Two with bank larceny, and in Count Three with armed bank robbery in violation of Title 18, United States Code, Sections 2113(a), (b), and (d).*

* That indictment superseded Indictment 73 Cr. 193, filed March 3, 1973, which named only Estremera and Washington.

Trial commenced against Estremera * on May 19, 1975 and concluded on May 23, when he was found guilty on all counts. On June 24, 1975 Estremera was sentenced to a term of seventeen years imprisonment and is now serving that sentence.

Statement of Facts

The Government's Case

On February 9, 1973 at approximately 10 A.M., four men, Raul Estremera, Oscar Lee Washington, Victor Cumberbatch, and Pedro Mario Monges, entered the branch of the First National City Bank located at 505 Southern Boulevard, Bronx, New York. Monges, Washington, and Estremera were all armed with handguns, and Cumberbatch carried a submachine gun. Monges first approached Rodolfo Romero, the bank guard, pointed a gun wrapped in a newspaper at him, and announced that a holdup was underway (Tr. 132-134).**

Washington then approached Albert Randall, the assistant bank manager, and struck him on the head with the butt of his pistol. While he was so engaged, Cumberbatch removed a submachine gun from underneath his cape and ordered all those in the bank to lie on the floor. Monges then leaped over the tellers' counter and approached the cash drawers. James Bolla, the bank manager, observed Washington hitting Randall and informed him that he was the manager of the bank. Washington then directed Bolla to go behind the tellers' counter. Bolla led Monges and Washington to the cash drawers,

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* Prior to trial Oscar Lee Washington and Pedro Mario Monges each entered pleas of guilty to Count One and were each sentenced to eighteen years imprisonment. Victor Cumberbatch is awaiting trial.

** "Tr." refers to the trial transcript; "GX" refers to Government Exhibit; "Br." refers to appellant's brief.

two of which they proceeded to loot of $25,321.75 (Tr. 54-58, 135).*

At the same time, Cumberbatch instructed Estremera, who was dressed in coveralls and a construction helmet, to search Romero, the bank guard, who was by then prostrate on the floor. Estremera approached Romero, who was lying on his stomach, sat on top of him, and removed his wallet. When Romero protested, Estremera told him in Spanish to keep his mouth shut (Tr. 138-139; GX 1-9). After removing Romero's wallet, Estremera arose, and in so doing noticed Romero's watch (GX 10-11). He then knelt down beside Romero and removed his watch from his left wrist (GX 12-20). While removing the watch, Estremera stared directly into Romero's face, then inches away (GX 15-17). While Estremera was staring at Romero, he also waved his gun at him (GX 18).

As Monges and Washington were completing their looting of the cash drawers, Cumberbatch knelt beside Randall, the assistant bank manager, and began beating him with his machine gun and robbing him of his valuables (Tr. 58; GX 16-40). One blow struck Randall's head with such force that it sent his glasses flying across the floor (GX 25-26).

Monges and Washington were the first to leave the bank, with Monges leading the way holding a bag containing the cash (GX 24-28). After those two had left the bank, Estremera remained at the doorway, his gun pointed at the customers and bank employees arrayed along the floor (GX 28-42). Estremera and Cumber-

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* While Monges and Washington were emptying the cash drawers, two surveillance cameras, placed above the bank's main entrance, were activated (Tr. 62, 68). The cameras photographed the remainder of the robbery, and certain of these photographs were introduced in evidence as Government's Exhibits 1-42.

batch then left the bank as well (Tr. 58-60, 138-146). Bolla then went to the window and observed the robbers drive off in a blue Ford bearing New Jersey license plates (Tr. 60-61).

The robbers, using the Ford and an Oldsmobile, drove six blocks from the bank to Crimmins Avenue. Leroy Irvin, a resident of the street, saw them leave those two cars and enter a red Ford van and another vehicle. Irvin noted the license number of the van (Tr. 182-185, 186-191).

On February 15, 1973, members of the New York City police department located the Ford van parked outside 354 Saratoga Avenue in Brooklyn. Oscar Lee Washington was arrested early that morning as he entered the van (Tr. 192-199). Later that afternoon at 354 Saratoga Avenue F.B.I. agents arrested Alberto Estremera, the owner of the van and the brother of Raul. (Tr. 288-293; GX 50).

On February 15, Raul Estremera appeared at the apartment of Frank Negron, a friend who lived at 2110 Atlantic Avenue in Brooklyn. They discussed the arrests of Washington and Alberto Estremera earlier in the day. Raul Estremera told Negron that the police were looking for him and he needed a place to stay (Tr. 214-219). Negron then asked Wayne Barrett, a mutual friend who was also present, to contact Blanca Arroyo, whose apartment Negron periodically borrowed. While Barrett was away, Negron and Estremera exchanged clothes (Tr. 218, 221).

Barrett brought Arroyo to Negron's apartment, and Estremera then accompanied the three to Arroyo's apartment. After they arrived there, Estremera asked Negron to lend him money to aid in his flight. He also asked Negron to obtain for him a pair of clear eyeglasses, which Negron subsequently ordered but never obtained (Tr. 221-224, 240-243).

Both Bolla and Romero selected Raul Estremera's photograph from among a spread of photographs (GX 43). Romero made the selection on February 15, 1973, when he was shown photographs by F.B.I. agents; he testified that he was able to identify Estremera in a split second (Tr. 140-148). Bolla testified that he was shown a photo spread by Jesse Berman, Estremera's counsel, in March, 1975, and that he identified Estremera. He repeated this identification in court (Tr. 71, 79-80).

The Defense Case

Joseph Winckler, an official with the Selective Service System, testified that the address which Selective Service maintained for Raul Estremera between 1967 and 1974 was Clearfield, Utah (Tr. 314). Estremera failed to respond to several Selective Service notices directing him to appear for a physical examination (Tr. 315-318). Estremera was classified I-A on March 12, 1969 and on January 15, 1971 was ordered to report for induction (Tr. 320-324). In late 1972 Estremera was indicted for draft evasion in the United States District Court for the Eastern District of New York, and on February 8, 1973 was so notified by letter sent to Clearfield, Utah (Tr. 325-326).

Kenneth Jackson, who was the head teller at the First National City Bank branch on the date of the robbery, testified that when the robbery began he was in the basement of the bank. When he heard a commotion upstairs, he proceeded up a stairway to the main banking floor. He halted four steps from the top of the stairs and looked between the banisters and a storage cabinet. From that vantage point he was able to see Estremera, whom he described as wearing coveralls and a construction helmet. Jackson was at that point fifteen feet from Estremera, but came closer when he moved to a small

room in the rear of the bank, where he hid at a doorway (Tr. 360-365).*

On February 15, 1973, Jackson was shown the same spread of six photographs by the F.B.I. that was shown to Romero (GX 43). He selected Raul Estremera as the person he had observed wearing the construction helmet (Tr. 365-367).

On March 14, 1975, Jesse Berman, Raul Estremera's lawyer, showed Jackson four photographs of Alberto Estremera, Raul's brother. These photographs had been taken in Berman's office a few days before, and several depicted Alberto dressed in coveralls and a hard hat striking poses similar to those found in the surveillance photographs (Tr. 330-336, 373). When confronted with this array, Jackson identified Alberto as the bank robber wearing the construction helmet and made appropriate notations on the backs of several photographs (Tr. 351-357). During his trial testimony Jackson was again shown a photograph of Alberto Estremera along with the photo spread of February 15, 1973. When asked to choose among all of these photographs, he selected Raul Estremera's picture as the one most closely resembling the bank robber (Tr. 368-369).

Jesse Berman testified that on March 14, 1975, he had shown a photo spread to James Bolla containing Alberto Estremera's picture (but not Raul's) and that Bolla had identified Alberto as the bank robber. Berman acknowledged that he had not asked Bolla to initial the back of the photograph he identified, as he had asked Jackson (Tr. 377-378, 381). He also acknowledged that he had shown a photograph of Alberto to Rodolfo Romero, and that Romero had not identified him as one of the robbers (Tr. 388).

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* Jackson never came within range of the surveillance cameras during the robbery, and does not appear in any of the surveillance photographs offered in evidence (Tr. 364). He admitted that Bolla and Romero were far closer to the robbers than he was (Tr. 365).

ARGUMENT

POINT I

The Government fully complied with the Southern District Plan for Achieving Prompt Disposition of Criminal Cases.

Estremera first argues that the indictment must be dismissed because the Government was not ready for trial within six months, as required by Rule 4 of the Plan for Achieving Prompt Disposition of Criminal Cases of the Southern District of New York (hereinafter "the Plan"). He contends, in essence, that the Government's delay of nine months in requesting extradition after Estremera's arrest in Canada violated the six month rule.

A similar motion was made prior to trial before Judge Duffy and denied on May 9, 1975.* In opposing the motion the prosecutor filed an affidavit setting forth a chronology of events beginning with the robbery of February 9, 1973 and ending with Estremera's detention in federal custody prior to trial.** Because of the

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* In the District Court Estremera also based his motion on the Sixth Amendment's speedy trial provision. He appears to abandon that branch of the argument here. In any event, the facts as set forth hereinafter make clear that no Sixth Amendment claim is tenable. *Cf. Barker* v. *Wingo*, 407 U.S. 514, 530-533 (1972); *United States* v. *Cacciatore*, 487 F.2d 240, 242 (2d Cir. 1973); *United States* v. *Saglimbene*, 471 F.2d 16 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973); *United States* v. *Counts*, 471 F.2d 422 (2d Cir.), *cert. denied*, 411 U.S. 935 (1973); *United States* v. *Fasanaro*, 471 F.2d 717 (2d Cir. 1973); *United States* v. *Infanti*, 474 F.2d 522 (2d Cir. 1973).

** None of the facts set forth therein was controverted in an opposing affidavit, and we do not believe that Estremera disputes any aspect of the Government's account.

obvious importance of this chronology, we set forth relevant portions of the affidavit in full:

> "2. Except where otherwise stated, the facts set forth herein are based on information and belief and have, in large measure, been gleaned from conversations with Special Agents Milton E. Ahlerich and Edward A. McShane, Jr. of the Federal Bureau of Investigation, and with Crown Prosecutor Louis-Phillipe Landry, Canadian Department of Justice, Montreal, Canada.
>
> 3. The bank robbery that is the subject of the instant indictment took place on February 9, 1973. On February 16, a complaint was filed before the Magistrate charging Estremera and others with participation in that robbery. Estremera was also charged in Indictment 73 Cr. 193, filed in this Court on March 2, 1973. He did not appear for arraignment on this indictment and a bench warrant was issued. The instant indictment, 73 Cr. 319, was filed on April 12, 1973 and superseded its predecessor. Estremera failed to appear for arraignment on this charge as well, and a bench warrant was issued.
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> 4. On or about January 29, 1974, Estremera was arrested in Canada for auto theft. Although he first identified himself to Canadian authorities as Juan Luciano Duran, he subsequently disclosed his true identity to them.
>
> 5. The first American official notified of Estremera's arrest was Edward McShane, the F.B.I. Agent stationed at Plattsburgh, New York. He was notified on or about January 30, 1974 by George Faille, Assistant Chief Inspector of the Montreal Urban Community Police. He in turn informed Milton Ahlerich, the New York Agent in charge of the investigation.

6. Among Agent McShane's regular duties is the maintenance of a liaison with Canadian immigration officials in connection with proceedings brought against American citizens in Canada. In the course of these duties he spoke to Robert Quintal of the Department of Manpower and Immigration on or about January 30, 1974, regarding Estremera.

7. During the conversation between McShane and Quintal it was agreed that deportation proceedings would be commenced against Estremera. There appeared to be three independent bases for the deportation: 1) Estremera, because of his prior criminal record, could be deemed an undesirable alien; 2) Estremera had entered the country under a false name, Juan Luciano Duran; 3) Estremera had violated Canadian law in committing the crime for which he had been arrested.

8. I am further informed by Mr. McShane, who has had over twenty years' experience in these matters, that deportation is the usual remedy employed against Americans apprehended in Canada; it is rarely necessary to resort to extradition, and the United States customarily initiates extradition only as a final recourse.

9. Deportation proceedings were duly commenced against Estremera by Immigration officials. During these proceedings Estremera, through his counsel, maintained that he was entitled to political asylum in Canada under the Geneva Convention of 1944. On or about April 1, 1974, the Canadian Immigration Court of Appeals ordered Estremera deported. He immediately filed an appeal with the Federal Court of Appeals in Canada.

10. The matter remained *sub judice* before the Federal Court until on or about October 30, 1974. On that day, the Court ordered the deportation proceedings against Estremera dismissed. Although it rejected his political asylum argument, it held that because Estremera's only conviction in the United States was a misdemeanor, he could not be deemed an undesirable alien.

11. Upon being notified of the Federal Court's decision, the United States Attorney's office immediately sought to initiate extradition proceedings. A telegram was sent by Paul J. Curran on October 31, 1974 to the Royal Canadian Mounted Police in Montreal requesting that Estremera be detained until extradition proceedings could be formally commenced.

12. Between November 1 and November 4, 1974, your deponent, after consulting with Mr. Landry of the Canadian Department of Justice, prepared papers to be submitted in the extradition hearing. These papers were duly docketed and filed in this Court on November 4, 1974, and copies were thereafter forwarded to the Department of Justice in Washington.

13. On November 15, 1974, Estremera was ordered extradited by Judge J. A. Nolan of the Canadian Federal Court. He appealed this decision, which was not affirmed until early January, 1975.

14. On January 3, 1975, Mr. Landry informed Agent McShane that Estremera's appeals had been exhausted and that the extradition order was thereby effective.

15. On January 6, 1975, Estremera was turned over to F.B.I. Agents McShane and John F. Curran. Estremera was then taken aboard an Air Canada flight to New York City. Upon arrival he was taken into custody by local F.B.I. agents and then transported to the United States Courthouse. Bail was fixed in the sum of $100,000 cash or surety bond by Magistrate Jacobs, and subsequently lowered to $50,000 by Magistrate Schreiber. Estremera remains in custody."

Estremera concedes that the period between April 12, 1973 and January 30, 1974 is excludable from computation under Rule 5(d) of The Plan because he was a fugitive. He also concedes that after October 31, 1974, the date extradition proceedings were initiated, the Government undertook reasonable efforts to secure his presence. He simply argues that the Government should have sought extradition as soon as it learned of his apprehension in Canada, and should not have resorted to deportation procedures. We submit that the nine month period between January 30 and October 31, 1974 is excludable under either Rule 5(a) or Rule 5(f) of The Plan.

Rule 5(f) provides that the following period shall be excluded from the computation of time within which the Government must be ready for trial:

> "The period of delay resulting from detention of the defendant in another jurisdiction provided the prosecuting attorney has been diligent and has made reasonable efforts to obtain the presence of the defendant for trial."

Equally applicable, and substantially identical with Rule 5(f) for these purposes is that portion of Rule 5(d) that excludes the period of time during which the de-

fendant is unavailable, and provides that "[a] defendant should be considered unavailable whenever his location is known but his presence for trial cannot be obtained by due diligence."

Rules 5(d) and (f) have recently been considered by this Court in *United States* v. *Oliver*, Dkt. No. 74-2412 (2d Cir., June 17, 1975). There a defendant had remained for nine months in Michigan state custody while a bank robbery indictment was pending against him in the Western District of New York. The Western District Assistant United States Attorney refrained from seeking a writ of *habeas corpus ad prosequendum* when he was informed that Michigan sought to pursue its murder prosecution against the defendant as expeditiously as possible. No writ was therefore sought until the Michigan prosecution had concluded. This Court found that the Assistant, aware of the existence of a more serious state prosecution, had made reasonable efforts to obtain the defendant's presence and had satisfied the diligence requirements of Rules 5(d) and (f).

In the present case, we submit that the Government's efforts to secure Estremera's presence were diligent and reasonable. The Government's interest was in obtaining Estremera's presence in the United States as quickly as possible, and it took what we believed to be the appropriate steps toward that end. As the prosecutor's affidavit indicates, Agent McShane of the F.B.I. and Mr. Quintal of the Canadian Department of Manpower and Immigration both knew deportation to be the most expeditious and least cumbersome way to secure the presence of an American citizen. As McShane stated, deportation, not extradition, was almost invariably the remedy used to obtain the return of American citizens. Nor was McShane, an agent of 20 years' experience in immigration matters, entirely unwarranted in assuming that deportation would succeed here, for the Canadian

Immigration Court of Appeals did affirm the deportation order. At most, the Government can be accused of an erroneous reading of Canadian law, an error shared by one Canadian official and a Canadian court; it can scarcely be accused of deliberately prolonging Estremera's stay in Canada. The alacrity with which the United States Attorney commenced extradition once the deportation order was quashed attests to the Government's interest in securing Estremera's presence as expeditiously as possible.

Rule 5(a) also renders excludable the nine month period during which deportation proceedings were pending. That provision excludes

> "[t]he period of delay while proceedings concerning the defendant are pending, including but not limited to proceedings for the determination of competency and the period during which he is incompetent to stand trial, pre-trial motion, interlocutory appeals, trial of other charges, and the period during which such matters are *sub judice*."

In *United States* v. *Cangiano*, 491 F.2d 906, 908-909 (2d Cir.), *cert. denied*, 419 U.S. 904 (1974) this Court held that the entire period of time (twenty-two months) during which a *separate* federal charge was pending in the same district against a defendant could be excluded under Rule 5(a). In his concurrence in *United States* v. *Oliver*, *supra*, Judge Lumbard suggested that the *Cangiano* court's application of Rule 5(a) to the pendency of separate charges may have been overly generous. He noted that "[e]xcept for the phrase 'trial of other charges', the Rule seems to be directed at proceedings in the case in which the Government's readiness time is being calculated." Slip opinion at 4075, n. 3. Even under Judge Lumbard's more restrictive reading, Rule 5(a) operates to exclude periods of time during which other proceedings

in the case in question are pending. The deportation proceeding against Estremera, as well as the extradition proceeding that followed it, was a proceeding ancillary to the indictment filed against Estremera in the Southern District of New York. As the prosecutor's affidavit indicates, the impetus behind the decision to deport Estremera was the United States Government's desire to try him expeditiously for bank robbery. The deportation proceeding thus must be deemed a "proceeding concerning the defendant", and therefore excludable under Rule 5(a).

Under Rule 7 a defendant need not demand a speedy trial in order to invoke the benefits of the Plan. We nevertheless submit that in weighing the diligence and the reasonableness with which the Government went about seeking the defendant's presence, this Court might well also look to the sincerity with which this speedy trial claim is now advanced. Estremera was a fugitive from these charges from the time of the robbery on February 9, 1973 until his apprehension in Canada on January 29, 1974. Evidence adduced at trial through the testimony of Frank Negron establishes that as of February 15, 1973 Estremera knew he was being sought and was looking for a place to hide (Tr. 214-224). Moreover, once Estremera was apprehended he showed not the slightest interest in obtaining a speedy trial until he was forcibly returned to the United States. During his year's incarceration in Canada, he never demanded to be tried immediately on these charges; to the contrary, he did everything possible to avoid standing trial. Indeed, the underlying flaw in Estremera's argument that the Government was "dilatory" in relying on deportation is that he alone possessed the ability to accelerate his trial date, had he so desired. He need only have waived extradition and agreed to return voluntarily to the United States; instead, he forced the Government to undertake time-consuming procedures to secure his

return. Cf. *United States* v. *McConahy*, 505 F.2d 770 (7th Cir. 1974). We submit that the ultimate responsibility for delaying Estremera's return to the United States is his, and not the Government's. Under these circumstances, his newly awakened sensitivity to his speedy trial rights upon his return to the United States was, we submit, a palpable sham.*

POINT II

Estremera's apparent claim that his conviction or further prosecution is somehow barred by the double jeopardy clause is without merit.

At the conclusion of the Government's summation, defense counsel, who had made objections during its course some of which were sustained and some overruled, moved for a mistrial on the ground that the summation had been fraught with impropriety. Judge Duffy reserved decision on the motion during the luncheon recess and, upon reconvening court in the afternoon, had the court

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* Estremera also claims that his case was severely prejudiced by the nine month delay (Br. 51). His arguments in that regard are baseless. He points out, for example, that by the time the case came to trial the building housing the bank had been razed. He thereby ignores the proof adduced at trial that the building was razed in September 1973, a time when he was still a fugitive (Tr. 54). Any prejudice resulting from the bank's destruction is thus scarcely attributable to the Government. Estremera also notes that by 1975 the memories of witnesses had faded. The supposed infirmity in the memory of such witnesses is nowhere specified, and it is obvious, given the nature of the trial testimony, that any such infirmity was far likelier to help Estremera than hinder him. He also claims that the additional delay gave the jury "the impression that appellant had been a fugitive that much longer." His ensuing attempt to plumb the jury's awareness of his status as a fugitive, of President Ford's clemency program, and of the nuances of the draft is wholly speculative, and has not the slightest factual basis.

reporter read back a portion of the prosecutor's summation. The trial judge asked defense counsel if he pressed the motion and, upon receiving an affirmative answer, granted the motion. Defense counsel asked to speak with his client and counsel and then requested to withdraw the motion for a mistrial (Tr. 477-484). The trial then continued, and Estremera was convicted.

On appeal Estremera claims that the prosecutor's summation was a deliberate attempt to force a mistrial so that there would be a new trial at which evidence excluded below might be successfully introduced. From this he appears to suggest for the first time that despite his withdrawal of the motion for a mistrial after it had been granted, his conviction should be set aside by this Court and his further retrial should be barred under the Double Jeopardy Clause of the Fifth Amendment. We respectfully submit that these arguments are without merit, since the withdrawal of the motion for a mistrial precludes the attack on the conviction on this ground and the double jeopardy claim. We further submit that the prosecutor's summation was not improper, and that the mistrial was not only improvidently granted, but in any event the result of the conduct of defense counsel. In consequence, the claim that the prosecutor engaged in deliberate misconduct in order to secure a new trial where evidence excluded below would be offered is without foundation in the record and entirely false.

It is settled that the bar of double jeopardy cannot be successfully pleaded if a mistrial is granted on motion of the defense. *United States* v. *Romano*, 482 F.2d 1183, 1187-1188 (5th Cir. 1973), *cert. denied*, 414 U.S. 1129 (1974); *Roberts* v. *United States*, 477 F.2d 544, 545 (8th Cir. 1973); *United States* v. *Pappas*, 445 F.2d 1194, 1200 (3rd Cir.), *cert. denied*, 404 U.S. 984 (1971); *Gregory* v. *United States*, 410 F.2d 1016, 1018

(D.C. Cir.), *cert. denied*, 396 U.S. 865 (1969); *Leigh* v. *United States*, 329 F.2d 883, 884 (D.C. Cir. 1964); *United States* v. *Burrell*, 324 F.2d 115, 119 (7th Cir. 1963), *cert. denied*, 376 U.S. 937 (1964). *See also United States* v. *Goldstein*, 479 F.2d 1061, 1056-1067 (2d Cir.), *cert. denied*, 414 U.S. 873 (1973). Estremera relies, however, on the implications of statements in such cases as *United States* v. *Tateo*, 377 U.S. 463, 472 n. 3 (1964), that a different result might be reached if a mistrial were precipitated by a deliberate attempt by the prosecutor to end by prejudicial conduct a trial which he feared might otherwise result in an acquittal. We do not question that under such extraordinary circumstances a defendant might demand a mistrial and, securing it, plead the bar of double jeopardy against a retrial. However, we do submit that once a defendant has moved for a mistrial and been granted it, he must pursue his double jeopardy remedy if and when the Government seeks to try him again. He cannot be permitted, upon moving for and being granted a mistrial, to withdraw the motion, let the case go to the jury, and then, upon conviction, demand that the judgment be reversed and that further prosecution be barred. Even under the cases on which Estremera relies, the declaration of a mistrial—and consequent termination of the trial—is a necessary predicate to raising a double jeopardy claim. Here Estremera has only been put in jeopardy once. Certainly no case suggests that a defendant, having secured the grant of a mistrial, may "hedge his bets" by letting the case go to the jury anyway and then, if unsuccessful, demand reversal and immunity from further prosecution. We submit that having deliberately rejected a mistrial below after it had been granted, Estremera cannot demand from this Court similar relief and its collateral benefits, nor attack such conduct of the prosecutor as may have been a factor in

the grant of a mistrial in the first place. *See Lawn* v. *United States*, 355 U.S. 339, 350-355 (1958). It is settled that counsel's failure to object during a prosecutor's summation precludes the raising of an argument based on this summation on appeal. *United States* v. *Perez*, 426 F.2d 1073, 1081 (2d Cir. 1970), *aff'd*, 402 U.S. 146 (1971); *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 238-9 (1940). It therefore follows a *fortiori* that an objection knowingly and deliberately *withdrawn* cannot form the basis of a renewed attack on appeal.* *United States* v. *Santana*, 503 F.2d 710, 716 (2d Cir.), *cert. denied*, 419 U.S. 1053 (1974).

Quite apart from any question of waiver of the point, Estremera's claim must be rejected because it is factually without merit. The argument is that the prosecutor's summation was deliberately made so improper and inflammatory that it required the granting of a mistrial by the trial judge. We submit that the summation, while not perfect, was neither prejudicial nor the sole basis on which the mistrial granted. The remarks which Estremera characterizes as "outlandish", "desperate", and "slanderous" must not be considered in isolation, as Estremera

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* Estremera appears to seek to justify his actions below by the suggestion that Judge Duffy, in granting the motion for a mistrial, "simultaneously and erroneously [ruled] that the case would have to be tried again" (Br. at 56; see also Br. at 59). The fact is, however, that while Judge Duffy clearly thought that a retrial would follow the mistrial, he did not so rule and defense counsel did not, in any event, ever suggest to him in the context of the remarks now relied on that a retrial would be barred by the Double Jeopardy clause. Indeed, Estremera would not have had to be content with Judge Duffy's views of the availability of double jeopardy protection, had he bothered to elicit them. Rather, he could have accepted the mistrial granted on his motion and sought review, prior to a retrial, of a rejection by the District Court of the Double Jeopardy claim now made. *United States* v. *Beckerman*, 516 F.2d 905 (2d Cir. 1975).

would prefer, but in the context of defense counsel's summation and behavior throughout the trial. Judge Mansfield recently condemned behavior by defense counsel "that not only tends to goad the prosecutor into possible improprieties but to undermine respect for the administration of justice." *United States* v. *DeAngelis*, 490 F.2d 1004, 1011 (2d Cir.) (Mansfield, J., concurring), *cert. denied*, 416 U.S. 956 (1974).* *See also United States* v. *Wilner*, Dkt. No. 74-1955 (2d Cir., September 10, 1975) slip op. at 6118; *United States* v. *LaSorsa*, 480 F.2d 522, 526 (2d Cir.), *cert. denied*, 414 U.S. 855 (1973); *United States* v. *Santana*, 485 F.2d 365, 370-371 (2d Cir. 1973), *cert. denied*, 415 U.S. 931 (1974). We submit that a close examination of the prosecutor's summation discloses that each of his allegedly improper remarks constituted an appropriate response to remarks of defense counsel.

Estremera first argues that it was improper to suggest that his counsel was, in one of his arguments, "misrepresenting the record". (Br. 54; Tr. 447). No objection was taken to the prosecutor's remark when made, nor was it specified in the motion made for a mistrial at the close of the prosecutor's summation. Moreover, if the passage in which the prosecutor's remarks appear (Tr. 446-447) is examined, it is clear that he was responding to a defense argument that was indeed a misrepresentation. In his summation, Estremera's counsel stated,

> "I think it is clear from Mr. Romero's testimony that he spent a good portion of the bank robbery lying down on his face. You can look through the bank robbery pictures. He says that the robber straddled him like a man on a horse and from the pictures and from his testimony, you

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* Judges Lumbard and Mulligan, the other members of the *DeAngelis* panel, joined Judge Mansfield's concurrence.

> can see that the robber was often facing backward and you can look at A through E, which show their relative positions and they are not face-to-face. *He doesn't get a good look at the robber.*" (Tr. 432-433) (Italics supplied).

Given four surveillance photographs (GX 15-18) that showed Romero staring directly into Estremera's face, we submit that it was indeed a misrepresentation to argue to the jury that Romero never had a good look at the robber. In the passage of which Estremera now complains, the prosecutor did no more than point this out. (Tr. 446-447).*

Another portion of the summation to which Estremera takes exception is the reading by the prosecutor of testimony that had been later stricken from the record (Br. 55). The Assistant United States Attorney's remarks (Tr. 469-470) indeed adverted to evidence that had been stricken, but at the instance of the prosecutor during the cross-examination of a government witness. Nonetheless, we concede that the prosecutor's citation of this evidence should not have occurred, but we submit that the prosecutor's error was more than balanced by defense counsel's tactics. The passage to which the prosecutor adverted in his summation appears during defense counsel's cross-examination of Frank Negron, and concerned contact between Negron and Estremera prior to February 15, 1973:

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* The prosecutor was not alone in finding defense counsel prone to misrepresentation. On one earlier occasion, Judge Duffy found that defense counsel had made "an absolute misrepresentation of the record" (Tr. of March 21, 1975 at 59), and on another he stated that he had been "extremely close to holding Mr. Berman in summary contempt, because what he was doing was lying to this Court and lying into the record, for what purpose I know not" (Tr. of May 12, 1975, at 19).

"Q. Now isn't it also true that prior to February 15, 1973 . . . you hadn't seen Mr. Estremera for about two weeks? A. Something around there, yes.

Q. And as far as you know, Mr. Estremera was not in New York? A. I figure he probably was.

Mr. Epstein: Objection, Your Honor.

The Court: Yes. This is getting into the area of speculation . . ." (Tr. 229).*

The prosecutor's citation of this passage came after defense counsel had repeatedly argued to the jury that Negron had testified that Estremera was *not* in New York prior to February 15: "Frank told us that Raul was not in New York for at least two weeks prior to February 15, the day that Frank saw him" (Tr. 411); "Frank said that he hadn't been in New York for at least two weeks before" (Tr. 412); "Frank told you that Raul had been out of town for two weeks prior to February 15, 1973" (Tr. 442). Needless to say, the record contained not a shred of support for these assertions; all that bore on the question was Negron's answer, admittedly stricken, that he thought Estremera probably was in New York. Although the prosecutor's argument should not have been made, its impropriety pales to insignificance when compared with the conduct of defense counsel which provoked his error. Moreover, as soon as the prosecutor's remarks were made, Judge Duffy reminded the jury that the quoted passage had, indeed, been stricken (Tr. 407). Compare

* Although the record does not so reflect, the prosecutor's objection was interposed before Negron's answer.

United States v. *Mallah*, 503 F.2d 971, 974 (2d Cir. 1974), *cert. denied*, 420 U.S. 995 (1975).

Estremera accuses the prosecutor of needlessly injecting politics into his summation (Br. 55). An examination of defense counsel's summation is once again in order. At the outset of his summation, defense counsel stated, "Then the Vietnam War comes along. Raul is active in anti-war and anti-poverty movements" (Tr. 406). Estremera is later described as a "draft resister" (Tr. 417), and in his concluding remarks, counsel stated "I beg of you not to hold the draft resistance thing against Raul Estremera" (Tr. 443). In fact, there was not a shred of evidence in the record suggesting that Estremera was for, against, or indifferent to the war in Vietnam, nor is there any evidence that he was a "draft resister". The evidence only showed that he had been *evading* the draft; the ideological underpinnings, if any, of the evasion were never articulated. In his summation, defense counsel nevertheless attempted to cloak Estremera in the mantle of the anti-war movement.* The prosecutor's political allusions (Tr. 475-476) were, we submit, no more than an attempt to rebut the unsupportable inferences that defense counsel was asking the jury to draw. The prosecutor thereby sought to suggest that those committed to the anti-war movement also adhered to a belief in non-violence, and that Estremera's actions in robbing the First National City Bank were scarcely consistent with such beliefs. The supposedly objectionable portion of the summation is explicitly framed as a response to defense counsel's remarks. Although musings on the anti-war movement may have been irrelevant to the facts at issue, we submit that the defense had opened the door to such a response.

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* He had done the same in his opening (Tr. 51-53).

Estremera also complains of the prosecutor's suggestions of impropriety with regard to his display of photographs to Government witnesses (Br. 54). A careful examination of the passage in question (Tr. 460-461) discloses that the prosecutor was merely drawing a comparison between the FBI's manner of displaying photographs to eyewitnesses, in which six photographs of different individuals were shown, and the manner in which defense counsel had induced an identification of Alberto Estremera, Raul's brother, from Kenneth Jackson, by displaying four photographs of Alberto Estremera dressed in the clothes worn by the bank robber. The prosecutor pointed out that it would have been clearly improper for the Government to employ such methods, and it was no more proper for defense counsel to do so. It was apparently on the basis of this argument that Judge Duffy granted the motion for the mistrial:

"The Court:

* * * * *

Mr. Reporter, would you read, once again, that particular part about impropriety. (Record read.)

The Court: Unfortunately in this case, and I do mean unfortunately, defense counsel felt obliged to testify, and in such a situation the jury identifies not only defense counsel but the defendant with defense counsel. Implied in the statement was that there was something improper. If we try this case again, there will be nothing like that.

Do you still move, Mr. Berman?

Mr. Berman: Yes, your Honor.

The Court: All right. Motion for a mistrial is granted" (Tr. 479).

We respectfully submit that the prosecutor was entitled to argue to the jury that it was improper for defense counsel to show four pictures of the defendant's brother, dressed up like the bank robber contended by the Government to be the defendant, to a witness to the robbery. Such a spread was about as "impermissibly suggestive" as any could be, and we submit that it is not within the duty which a defense counsel owes to his client to engage in activities of this sort. This is particularly true when defense counsel uses the testimony of a witness (Kenneth Jackson) he has misled in this fashion as part of the defense case and compounds the impropriety by himself taking the stand, *United States* v. *Alu*, 246 F.2d 29, 33 (2d Cir. 1957), to testify about that incident and about his use of one such photograph as part of a spread shown to another witness (James Bolla) who had testified for the Government and whom defense counsel had improperly, *United States* v. *Puco*, 436 F.2d 761 (2d Cir. 1971), cross-examined about their conversation. Under the circumstances the prosecutor's remark about the manner in which the identification of the defendant's brother as the bank robber was obtained from Kenneth Jackson was entirely correct and warranted, particularly since the conduct of defense counsel was as proper a subject of comment in the prosecutor's summation as that of any other witness.* Indeed, Judge Duffy's declaration of a mistrial does not appear to have occurred because he thought the prosecutor's remark improper or ill-founded, but rather because he apparently believed that since defense counsel had "[u]nfortunately . . . and I do mean unfortunately" taken the stand, the defendant might be

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* Indeed, in his summation defense counsel had attacked the Assistant United States Attorney by name in connection with what he thought was an improperly suggestive identification technique (Tr. 433-435).

unfairly judged on the basis of his attorney's pretrial activities. While in our view this was not a sufficient basis upon which to grant the motion for a mistrial, *see Gori* v. *United States*, 367 U.S. 364 (1961); *United States* v. *Gentile*, Dkt. No. 75-1248 (2d Cir., October 24, 1975), we submit that the basis upon which the mistrial was declared in no way supports the claim that the Government was deliberately seeking to abort the trial any more than do the other portions of the prosecutor's summation cited by Estremera.

The final basis for the claim that the Government deliberately induced a mistrial is an affidavit submitted by defense counsel in support of his post trial motions, in which he purports to recount a conversation with the prosecutor.* The contents of that affidavit, quoted in pertinent part in Estremera's brief at 53, do not disclose any evidence that the prosecutor had deliberately sought to provoke a mistrial. Rather, they reveal simply that the prosecutor thought that the trial judge had erroneously excluded crucial evidence from the Government's case,** which he had, and that if a mistrial had been

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* Estremera points out, in a footnote, that "the prosecutor did not submit any opposing affidavit" (Br. 53). He fails, however, to point out that his counsel's affidavit was part of a new trial motion that was filed on June 23, 1975, one day before Estremera's sentence (Tr. of June 24, 1975, at 2). The submission of the motion on one day's notice was in deliberate contravention of Judge Duffy's direction that all post-trial motions be submitted no later than June 20 (Tr. 520), and did not afford the Government time to prepare a response. It should further be noted that Judge Duffy denied the motion without asking for any submission, oral or written, from the Government (Tr. of June 24, 1975 at 2).

** The Government called as a witness one Ruven Matias, on whom use immunity was first conferred (Tr. 258-261). Before the jury was called in, Estremera's counsel asked for an offer of proof concerning Matias' testimony. The prosecutor stated that Matias would testify that he had met Raul Estremera

[Footnote continued on following page]

in mid-January 1973 in San Jose, California, and that he accompanied Estremera by car from California to New York. Estremera had purchased five rifles, two handguns and 300 rounds of ammunition in California, which he took with him to New York. Matias and Estremera arrived in New York on January 22, 1973, and went to 354 Saratoga Avenue in Brooklyn, where they met co-defendants Oscar Lee Washington and Victor Cumberbatch, who helped Estremera unload the weapons. After spending several days in New York, Matias returned by bus to California, where he arrived on February 1. Shortly thereafter he received a call from Estremera, who told him that he was planning to "pull another job in New York". In mid-February, Matias received a call from Alberto Estremera, who informed him that a package was on its way out to Matias. When Matias received the package, it was found to contain $2,500 in five packets of $500 each (Tr. 264-265).

After hearing the offer of proof, Judge Duffy excluded Matias' testimony in its entirety, because "for the life of me I don't see the relevance of most of it" (Tr. 265). The Government again sought to put Matias on the stand at the close of the defense case, and Judge Duffy adhered to his original ruling (Tr. 389).

Matias' testimony was plainly relevant and material and Judge Duffy, we submit, erred in excluding it. The relevance of Estremera's meeting with and supplying arms to other bank robbers, and his statement that he was planning to "pull a job" is readily apparent. Matias' testimony, however, was also necessary to rebut two of Estremera's principal defenses. Matias' testimony established Estremera's presence in New York in the weeks prior to the bank robbery, whereas the defense maintained that he was in Utah and did not come east until approximately February 10 (Tr. 409-412). The receipt of cash by Matias indicated that the robbers had disposed of the money quickly, and rebutted the defense argument that Estremera could not have been the robber because he asked Frank Negron for money (Tr. 414).

Finally, although defense counsel suggests without basis that the exclusion of Matias' testimony caused the prosecutor to seek to abort the trial at any cost, we think it far more likely that the only tactical implications of the exclusion of Matias' testimony were in Estremera's rejection of the mistrial that was accorded him by Judge Duffy later in the trial. It seems more than likely that Estremera knew that as a retrial such evidence would be admitted, as indeed it should have been here. *Cf. United States* v. *Natelli*, Dkt. No. 75-1004, *on rehearing* (2d Cir., October 6, 1975).

granted, it would have offered him an additional opportunity to use the evidence against Estremera. There was nothing improper about the intention ascribed to the prosecutor, *see United States* v. *Ragano*, 520 F.2d 1191, 1196-1199 (5th Cir. 1975), and even on defense counsel's version of the facts, the prosecutor's remarks hardly support a claim that he intentionally engaged in misconduct with the hope of aborting the trial. Moreover, when the contention now raised was made to Judge Duffy, who had presided at the trial and was in the best position to assess the prosecutor's conduct and motivations, it was dismissed out of hand. Finally, it must be noted that the Government's case, while not assisted by Judge Duffy's exclusion of the testimony of Matias, was by no means so weak as to warrant any substantial concern for acquittal on the prosecutor's part. The evidence of Estremera's guilt was substantial, and the jury had no difficulty in arriving promptly at a proper verdict.

POINT III

The trial court's refusal to permit Estremera to appear in a lineup was a proper exercise of discretion.

Prior to trial, Estremera moved to appear in a lineup before the Government's bank witnesses. Judge Duffy denied the motion, reasoning that "it would be a tremendous, absolutely tremendous detriment to your client to have a lineup at this point" (Tr. of March 10, 1975 at 5). He added that if a lineup were held, "any witness who identified the defendant on trial would have the opportunity to identify him in person, just, you know, like a week before trial" (*Id.* at 6). Estremera now argues that this decision was an abuse of discretion, and a violation of his Fifth and Sixth Amendments rights to equal protection and confrontation of the witnesses against him.

This Court first considered the question of a defendant's right to a lineup in *United States* v. *Ravich*, 421 F.2d 1196 (2d Cir.), *cert. denied*, 400 U.S. 834 (1970), a case which Estremera chooses to ignore. Writing for the Court, Judge Friendly held:

> "While appellants speak in terms of denial of a constitutional right, they have not elaborated on what the right is. Clearly there is no violation of the confrontation clause of the Sixth Amendment; defendants not merely were given full opportunity to cross-examine the witnesses at trial but had the benefit of the pre-trial proceedings in doing so. If the right is thought to be the Sixth Amendment's guarantee to a criminal defendant of "compulsory process for obtaining witnesses in his favor," the argument would put considerable strain on the words and their history. We would likewise not be disposed to hold a lineup to be so essential to the presentation of a proper defense concerning identification that refusal to arrange one on a defendant's request is a denial of due process of law. On the other hand, we can see how a prompt lineup might be of value both to an innocent accused and to law enforcement officers. A pre-trial request by a defendant for a lineup is thus addressed to the sound discretion of the district court and should be carefully considered [footnote omitted]. Without any attempt at being exhaustive, we think some relevant factors are the length of time between the crime or arrest and the request, the possibility that the defendant may have altered his appearance (as was at least attempted here), the extent of inconvenience to prosecution witnesses, the possibility that revealing the identity of the prosecution witnesses will subject them to intimidation, the propriety of other identification procedures used by the prosecution, and the degree of doubt concerning the identification." 421 F.2d at 1203.

Ravich has been followed by this Court on several subsequent occasions. In *United States* v. *Fernandez*, 456 F.2d 638, 641 n. 1 (2d Cir. 1972), this Court stated that "prosecutors might well consider whether they would not only better protect the rights of the defendant but save themselves much needless argument if, in a case like this, where the defendant was in custody and there was no time pressure, they would have a properly conducted lineup". In *United States* v. *Boston*, 508 F.2d 1171 (2d Cir. 1974), *cert. denied*, 421 U.S. 1001 (1975) where the observation in *Fernandez* was reiterated, the Court also repeated the *Ravich* holding that the denial of a lineup request did not constitute reversible error. 508 F.2d at 1176-1177. See also *United States* v. *Zane*, 495 F.2d 683, 699-700 (2d Cir.), *cert. denied*, 419 U.S. 895 (1974).*

The essence of *Ravich* and its progeny is that there is no Constitutional right to a lineup, and that a defendant's request for a lineup is addressed to the sound discretion of the district court. Given the factors governing the exercise of that discretion enumerated in *Ravich* and *Fernandez*, Judge Duffy did not err in denying Estremera's lineup request here.

This Court's admonition to prosecutors regarding the advisability of lineups in *Fernandez* and *Boston* specifically presupposes that a defendant is available at the time an initial identification is sought. Under those circumstances, when a prosecutor may choose

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* Other Circuits that have considered the question have also concluded that a defendant has no Constitutional right to a lineup. See *United States* v. *McGhee*, 488 F.2d 781, 786 (5th Cir.), *cert. denied*, 417 U.S. 949 (1974); *United States* v. *White*, 482 F.2d 485, 488 (4th Cir. 1973), *cert. denied*, 415 U.S. 949 (1974); *United States* v. *Hurt*, 476 F.2d 1164, 1168 (D.C. Cir. 1973); *United States* v. *Hall*, 437 F.2d 248, 249 (3d Cir.), *cert. denied*, 402 U.S. 976 (1971); *Hargrove* v. *Slayton*, 349 F. Supp. 75, 76 (W.D. Va. 1972).

between displaying photographs and displaying live suspects to its witnesses, a lineup is, as this Court noted, surely preferable. But that choice was not available to the prosecution here. On February 15, 1973, when photographs were first shown to bank employees, Estremera was a fugitive; he continued to be unavailable for a lineup until January, 1975. This Court's strictures in *Fernandez* do not contemplate the unavailability of a defendant; rather, they refer to the situation where a defendant is "in custody and there was no time pressure." 456 F.2d at 641, n. 1.

The first of the factors which *Ravich* defines as governing the district court's discretion is "the length of time between the crime or arrest and the request [for a lineup]". Here, the interval was twenty-five months, from February, 1973 until March, 1975, whereas the interval between the robbery and the display of photographs was six days. Judge Duffy could certainly have concluded that a display of photographs immediately following the robbery was likely to be a more reliable means of identification than a long delayed lineup. Moreover, the issue of the propriety of the photospread was fully litigated in the district court: a hearing was held pursuant to *Simmons* v. *United States*, 390 U.S. 377 (1968), and the judge ruled, in a decision filed on April 10, 1975, that the photospread was not unduly suggestive and that the witnesses had an adequate opportunity to observe Estremera during the robbery.* *Ravich* also listed "the propriety of other identification procedures used by the prosecution" as another factor guiding the Court's discretion. Judge Duffy found the Government's procedures here to be proper and thus Estremera cannot argue that a lineup was necessary to cure the taint of an improper photospread.

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* That finding is not challenged on appeal.

The *Ravich* court also adverted to "the possibility that the defendant may have altered his appearance" as another factor governing the exercise of discretion. At trial, Estremera appeared substantially different than he did in the bank surveillance photographs.* The record, moreover, contains evidence of his intention to change his appearance from the time the bank robbery was committed. Frank Negron testified (Tr. 224) that Estremera asked him for a pair of clear eyeglasses six days after the robbery. If Estremera was interested in changing his appearance at that time, his incentive for appearing different by the time of trial was obviously even greater. Judge Duffy was thus entitled to conclude that a photospread containing a picture of Estremera taken in August, 1970 (GX 43C), before he had reason to change his appearance, offered a mere reliable opportunity for identification that a lineup involving one who had the opportunity to spend two years altering that appearance.

Finally, it should be noted that Judge Duffy's ruling on the lineup request was motivated by a concern for the defendant's interest; his stated reason for denying the motion was a concern that the Government witnesses have a preview of Estremera's appearance before being required to pick him out in court. Because the trial was then imminent,** Judge Duffy's concern was, we submit, a legitimate one. Under these circumstances, it can hardly be said that he abused his discretion in denying the lineup request.***

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* Although the record does not explicitly disclose his appearance, we believe that it is undisputed that at trial Estremera was clean shaven and substantially thinner than he appeared in 1973.

** As of March 10, the date Judge Duffy denied the lineup motion, the trial was scheduled to begin on March 31 (Tr. of March 10, 1975 at 31).

*** It should be noted that during the trial, when the Government's witnesses were called to the stand, Estremera was seated

[Footnote continued on following page]

POINT IV

Estremera was not prejudiced by the use of metal detectors and the presence of marshals behind him in the courtroom.

Estremera claims that the employment of a metal detector outside the courtroom, used to screen spectators, and the presence of a marshal near him in the courtroom denied him a fair trial. The claim is factually erroneous and legally unsound.

At the outset of the trial, before a jury was selected, defense counsel objected to the employment of metal detectors by marshals at the door of the courtroom and expressed his concern that the jury might see this device being used (Tr. 11-13). Judge Duffy therefore instructed the marshal that the jury, once empaneled, was to be brought to and from the courtroom by a side elevator, thus avoiding a view of the metal detectors (Tr. 12-13). Defense counsel then also requested that the side elevator be used for the entire panel of prospective jurors, who had not yet been brought into the courtroom. Judge Duffy replied that he saw no problems with employing the regular elevators while the prospective jurors were entering the courtroom.

The above exchange now provides the basis for the assertion that the jury viewed the metal detectors, and that "the entire panel of prospective jurors was ushered into the courtroom through the same door as the public, while

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at the defense table (Tr. 59, 140-141). Defense counsel could, of course, have created an *ad hoc* lineup by seating Estremera in the back of the courtroom, among the spectators, an accepted practice in the Southern District. He chose instead to keep Estremera at the defense table, in order to argue to the jury that the presence of a defendant at the defense table made an in-court identification inevitable (Tr. 427-428).

the public was being searched with metal detectors and while the marshals were taking down the names of all spectators." (Br. 67). There is not the slightest support in the record for that imaginative leap. There is nothing to suggest that the marshals had the metal detectors visible while the prospective jurors were entering the courtroom. Indeed, the only way the devices could have been visible is if they had been used to screen the jury panel, and that is preposterous.

Even if Estremera's speculative assertions are assumed to be true, there is no specific showing of prejudice to Estremera, as this Court required in *United States* v. *Torres*, 519 F.2d 723, 727 (2d Cir. 1975). Even if some jurors saw the device, there is no evidence that all saw it, and no evidence that any of those ultimately selected for the jury saw it.* Moreover, the remedy which defense counsel proposed to Judge Duffy, the giving of a cautionary instruction, was more likely to draw attention to the use of the devices than put it from the jury's mind.

Estremera also complains of the presence of a marshal seated directly behind him in the courtroom, and claims that he was irremediably prejudiced when, during a recess in the jury selection, he walked out of the courtroom in the company of two marshals. Judge Duffy considered both of these objections (Tr. 13-19, 18-21, 23), and found no prejudice to Estremera. His conclusions under these circumstances are entitled to great weight. With regard to the marshal's seating, Judge Duffy observed that he was sitting four feet from Estremera, that such was the normal practice in the Southern District, that there was nothing in his dress or appearance to suggest that he was a marshal (Tr. 13-15). The objection that Estremera was

* It is apparently conceded that the jury, once empaneled, used a side elevator and thus never saw the metal detectors.

prejudiced because he walked past the jury panel in the company of two marshals is similarly specious. The assertion in Estremera's brief that he was "paraded" in front of the jury box (Br. 68) is open to serious dispute.* All that is established is that Estremera walked by the jury box in the company of two men dressed in civilian clothes; that scarcely compels the conclusion that he was in custody. Several courts have held that the presence of even uniformed guards in a courtroom, seated near a defendant, does not constitute prejudice requiring reversal. *Snow* v. *State of Oklahoma*, 489 F.2d 278, 280 (10th Cir. 1973); *Dorman* v. *United States*, 435 F.2d 385, 397-398 (D.C. Cir. 1970); *United States* v. *Greenwell*, 418 F.2d 846, 847 (4th Cir. 1969). The presence of plainclothes guards is thus permissible *a fortiori*.

POINT V

The trial court did not err in granting the Government's motion under Rule 16(c) for discovery of photographs in the possession of the defense.

On March 21, 1975, the prosecutor moved, pursuant to Rule 16(c) of the Federal Rules of Criminal Procedure, for discovery of photographs which defense counsel had shown to Kenneth Jackson (Tr. of March 21, 1975, at 5). Judge Duffy reserved decision on the motion, and on April 4, 1975, the prosecutor filed a memorandum

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* The prosecutor's contemporaneous description of the incident, which Estremera quotes in his brief only in part, (Br. 68) is as follows:

"Your Honor, I think the record should reflect that Mr. Estremera was merely walked out of the courtroom with a marshal in front of him and one behind him; he was not manacled, he was not being forcibly led, and I don't think the conclusion would be inevitable that he was in custody under those circumstances" (Tr. 19-20).

and affidavit setting forth how he had learned from Jackson that photographs had been shown to him. On April 10, 1975, Judge Duffy filed a memorandum decision in which he ruled as follows:

> "There remains a motion by the government under Rule 16(c) of the Federal Rules of Criminal Procedure for discovery of certain photographs the defense attorney had shown to Mr. Kenneth Jackson, a potential government witness, during March of 1975. I find this request to be both material and reasonable. The motion for discovery is therefore granted."

The photographs were turned over by the defense prior to trial, and at trial it was disclosed that they depicted Alberto Estremera (Tr. 373). It is now claimed that Judge Duffy erred in granting the Government's motion, and that this error mandates reversal of the conviction.

Rule 16(c) permits a district judge, who has granted discovery to the defendant, to allow the Government to discover comparable items within the possession of the defense. As the Advisory Committee's note states,

> "This subdivision permits the court to condition a discovery order under subdivision (a)(2) and subdivision (b) by requiring the defendant to permit the government to discover similar items which the defendant intends to produce at the trial and which are within his possession, custody or control under restrictions similar to those placed in subdivision (b) upon discovery by the defendant."

Estremera first argues that Judge Duffy erred in requiring disclosure of the photographs because the Government furnished discovery items to the defense vol-

untarily rather than under the compulsion of a court order. He correctly notes that at the hearing on February 19, 1975, in which Estremera's discovery motion was considered, the prosecutor consented to furnish most of what was requested. Indeed, the prosecutor consented to turn over material that could not have even been compelled under Rule 16, such as a copy of two entire bank surveillance films (Tr. of February 19, 1975, at 6), prints of every frame on each film (*Id.* at 3), F.B.I. fingerprint reports pertaining to all four defandants in the case (*Id.* at 6-7), and mug shots of the other defendants (*Id.* at 16). The Government also made available a copy of the photospread containing Estremera's picture that was shown to the bank witnesses (*Id.* at 10-11). A reading of the minutes of the February 19, 1975, hearing discloses, we submit, that the prosecutor understood his discovery obligations and thereby consented to most of what Estremera requested. Estremera now argues, however, that the Government can only obtain reciprocal discovery if it insists on the burdensome formality of a court order. Not only is that argument illogical; if taken seriously, it would compel the United States Attorney to abandon the procedure of informal discovery that now prevails in the Southern District, and to relinquish only what could be compelled under Rule 16.

Estremera's next argument is that because Rule 16(c) contemplates conditioning discovery by the Government on reciprocal discovery by the defendant, see *United States* v. *Wright*, 489 F.2d 1181, 1191 (D.C. Cir. 1973), no such conditional order can issue *after* the defense has obtained its discovery documents. The answer to that argument is found in *United States* v. *Milano*, 443 F.2d 1022, 1027 n. 1 (10th Cir.) (Coffin, C.J.), *cert. denied*, 404 U.S. 943 (1971). The Court there held that "[t]here is nothing in the statute requiring the court to impose this condition [of reciprocity] at the same time it grants defendant's discovery. It may condition its original 16(b) order at a later date. Defendant's

objection to the timing of the 16(c) order is without merit".* *Milano's* reading of the retrospective application of Rule 16(c) accords, we submit, with the manifest intent of the rule and with common sense. Estremera has not profferred any cases which suggest a contrary interpretation.

Finally, Estremera claims that his case was prejudiced by the disclosure of the photographs because the prosecution thereby learned that his principal defense was based upon confusion between the brothers Estremera. There are several answers to this argument. First, defense counsel minimized the potential use of the photographs by refusing to comply with Judge Duffy's disclosure order. Although that order was filed on April 10, defense counsel did not turn over the photographs until May 9, 1975, when Judge Duffy threatened to hold him in contempt (and summoned a marshal for that purpose) unless the photographs were turned over forthwith (Tr. of May 9, 1975, at 1-12). The second rejoinder to Estremera's argument is that until the disclosure during the course of the trial, the Government did not know that Alberto Estremera was the person depicted in the defense photographs. This ignorance is demonstrated in the tes-

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* We feel compelled to direct the Court's attention to a passage in Estremera's brief that appears at pp. 72-73. There, he refers to a memorandum submitted by the prosecutor to Judge Duffy in which the above cited passage from *Milano* is also quoted. Estremera then states:

> "At the time he received this memorandum, counsel believed that the above "quote" from 'Milano' was genuine. A recent review of *Milano, supra,* revealed that neither the above 'quote' nor anything closely approximating it appears in the *Milano* opinion."

Accusing an opposing counsel of fabricating a quotation and of deliberately misleading a judge is a serious charge. Before launching such a change, defense counsel might have consulted 443 F.2d at 1027, n. 1, where the *Milano* quotation appears just as it was cited in the Government's memorandum.

timony of Milton E. Ahlerich, the F.B.I. agent in charge of the case from the time of the bank robbery, who was unable to identify Alberto Estremera as the person in the photographs despite considerable prompting by defense counsel on cross-examination (Tr. 293-294). Because the Government was unaware that Alberto was the person in the photographs, there was no diminution in "surprise" when his identity was disclosed at trial, and it cannot be fairly said that the Government had discovered a crucial defense tactic. Finally, assuming that the disclosure of these photographs did enable the Government to anticipate a defense tactic at trial, there is no reason why that result is unfair. Clearly the purpose of Rule 16 is to minimize surprise at trial and to allow for the fullest exploration of the facts. While pretrial disclosure of evidence may OFTEN raise dangers of witness tampering or subornation, that was hardly the case here.

POINT VI

The trial court's refusal to appoint Estremera's counsel under the Criminal Justice Act was an appropriate exercise of discretion.

Estremera claims that Judge Duffy erred in not ordering his counsel reimbursed under the Criminal Justice Act. Estremera's counsel filed a notice of appearance on January 20, 1975* and on March 4, 1975, filed a motion seeking appointment under the Criminal Justice Act. Judge Duffy heard argument on the motion on March 10, 1975 (Tr. of March 10, 1975, at 15-18) and denied it on March 21, 1975 (Tr. of March 21, 1975 at 3). Estremera claims this to be an abuse of discretion.

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* Docket sheet at p. 3.

The plan of the United States District Court for the Southern District of New York under the Criminal Justice Act of 1969, 18 U.S.C. § 3006A, at Section IV(B) 5, provides:

> "Counsel shall be designated and appointed by the District Judge, and no person shall select his own counsel from the panel of attorneys or otherwise."

Even apart from this provision, which disposes of Estremera's argument, it is settled law that the right of an accused to court appointed counsel does not imply the right to select a particular attorney. *United States* v. *White*, 451 F.2d 1225, 1226 (6th Cir. 1971); *United States* v. *James*, 301 F. Supp. 107, 141 (W.D. Tex. 1969). Nor is Estremera aided materially by that portion of Section IV(c) of the Plan cited at p. 76 of his brief. That provision clearly contemplates the situation in which a defendant who has previously retained counsel finds his resources diminished and seeks to have his retained counsel appointed. Here, it is perfectly clear that Estremera, who had been incarcerated since January, 1974, had no funds with which to compensate a lawyer from the outset, and that his counsel must have entered the case knowing that the Criminal Justice Act was his only hope for compensation. We submit that Section IV(C) of the Plan does not apply to such a situation. Even if it does, the language of the section ("The District Judge . . . may appoint") makes clear that the determination to appoint is wholly discretionary. The reason Judge Duffy gave for refusing to appoint, namely, his concern that the largesse of the Criminal Justice Act be evenly distributed among the attorneys on the panel, was scarcely arbitrary or abusive of his discretion (Tr. of March 10, 1975 at 15-18).*

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* In that same statement, Judge Duffy, indicated that he would be willing to appoint as Estremera's attorney the next lawyer in rotation on the C.J.A. panel.

[Footnote continued on following page]

Mention should also be made of Estremera's argument that Judge Duffy's determination deprived him of funds with which to hire an investigator, thereby requiring his counsel to display photographs to Government witnesses himself and forcing him to testify at trial. First of all, no application was made to Judge Duffy for funds for investigative services under 18 U.S.C. § 3006A(e). Second, there is nothing in Section 3006A(e), which provides for investigative and other services for an indigent defendant, that limits the availability of such services to defendants with counsel appointed under the Criminal Justice Act. A showing of indigency alone is required, and there was nothing to stop defense counsel below from applying to the District Court for assistance for Estremera under that subsection. Third, the record indicates no manpower shortage in the defense camp. Estremera had the services of two lawyers at counsel table throughout the trial, Jesse Berman and Lawrence Stern. In addition, the defense also employed Steven Bernstein, a law clerk in Berman's office before and during the trial. He was specifically introduced to Judge Duffy (Tr. of March 21, 1975, at 2) and his assistance is also acknowledged at p. 82 of the brief submitted in this Court.

Judge Duffy also granted several defense requests for services under the Criminal Justice Act, including transcription of the minutes of pre-trial proceedings (Tr. of March 10, 1975, at 20) and daily copy of the trial transcript (Tr. of May 9, 1975, at 26-27).

POINT VII

The sentence imposed by the trial court was in all respects proper.

Estremera argues that the seventeen year sentence imposed by Judge Duffy was improper.* He ignores he settled law in this Circuit that

> ". . . . absent reliance on improper considerations, see *United States* v. *Mitchell*, 392 F.2d 214, 217 (2d Cir. 1968) (Kaufman, J., concurring), or materially incorrect information, see *United States* v. *Malcolm*, 432 F.2d 809, 816 (2d Cir. 1970), a sentence within statutory limits is not reviewable. See, *e.g. United States* v. *Brown*, [479 F.2d 1170, 1172 (2d Cir. 1973)]; *United States* v. *Dzialak*, 441 F.2d 212, 218 (2d Cir.), *cert. denied*, 404 U.S. 883 (1971)." *United States* v. *Velazquez*, 482 F.2d 139, 142 (2d Cir. 1973).

Accord, Dorszynski v. *United States*, 418 U.S. 424, 440-441 (1974); *United States* v. *Tucker*, 404 U.S. 443 (1972); *Gore* v. *United States*, 357 U.S. 386, 393 (1958); *United States* v. *Hendrix*, 505 F.2d 1233 (2d Cir. 1974).

Estremera seeks to escape the force of these precedents by invoking cases in which this Court has condemned "a fixed and mechanical approach in imposing sentence" *United States* v. *Brown*, 470 F.2d 285, 288-289 (2d Cir. 1972); *United States* v. *Schwarz*, 500 F.2d 1350, 1352 (2d Cir. 1974).

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* A virtually identical claim was raised by Estremera's co-defendant Oscar Lee Washington, who had pleaded guilty, on appeal from Judge Duffy's denial of his motion to reduce sentence under Rule 35 of the Federal Rules of Criminal Procedure. It was rejected by this Court from the bench. *United States* v. *Washington*, 490 F.2d 1406 (2d Cir. 1974) (Waterman and Mulligan, C.JJ., and Bryan, D.J.)

Estremera perceives a "fixed and mechanical" approach in Judge Duffy's decision to impose comparable sentences on all three defendants convicted in this case, himself, Monges, and Washington. He thereby misunderstands the cases on which he relies, for this Court has directed its criticism to "a fixed sentencing policy based on the category of crime rather than on the individual record of the defendant." *United States* v. *Baker*, 487 F.2d 360, 361 (2d Cir. 1973). He could thus bring his case within the rubric of *Baker*, *Schwarz*, and *Brown* only if he could demonstrate that all bank robbers who come before Judge Duffy receive comparable sentences. No such showing has been made or even attempted, and his citation of *Brown* and its progeny is thus inapposite.

Moreover, a review of the sentencing minutes reveals that Judge Duffy's approach was anything but "fixed and mechanical", and that he approached his responsibility with care. He stated that he had consulted with several other judges, whom he had selected "from each end of the spectrum" of severity (Tr. of June 24, 1975, at 7). He remarked that "I have often commented on how difficult it is to sentence a fellow human being. This particular case is perhaps even more difficult than the others." (*Id.* at 24-25). He acknowledged defense counsel's lengthy recitation of "all the good things" in Estremera's background, and then proceeded to analyze the manner in which the bank robbery had been committed and Estremera's role in it (*Id.* at 25).*

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* Estremera's argument that his only prior conviction was a misdemeanor, and that he thus stood in a significantly different light than Monges and Washington, is disingenuous. There had been testimony before Judge Duffy in a pre-trial hearing that Estremera had been identified, through fingerprints on a sale application, as the purchaser of an automatic rifle used in the attempted murder of two police officers in Queens in January, 1973. (Tr. of May 13, 1975, at 97-99) Judge Duffy was entitled to, but did not, take those facts into consideration. Nevertheless, that evidence hardly suggests that Estremera's activities prior to the bank robbery were innocuous.

The argument that Judge Duffy was insufficiently discriminating in his approach to Estremera's sentence is not without its irony. We invite this Court's attention to the sensitivity and discrimination displayed at the time of sentence by Estremera's counsel, who recommended that Estremera be put on probation (Tr. of June 24, 1975 at 22-24). We submit that the savagery and brutality with which this bank robbery was committed is eloquently portrayed in the surveillance photographs, and that under those circumstances a seventeen year sentence was hardly an abuse of discretion. *United States* v. *Pacelli*, 521 F.2d 135, 141 n. 6 (2d Cir. 1975).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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Of Counsel.

★ U. S. Government Printing Office 1975— 614—350—585

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Jeremy G. Epstein being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 13 day of November, 1975 he served 2 copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

Jesse Berman, Esq.
351 Broadway
New York, New York

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Jeremy G. Epstein

Sworn to before me this
13th day of November, 1975
Gloria Calabrese

GLORIA CALABRESE
Notary Public, State of New York
No. 24-0535340
Qualified in Kings County
Commission Expires March 30, 1977